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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 113

FRANK DOLMAGE,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

DONALD A. CHAPMAN,
Counsel for Petitioner.

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No. 113

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Frank Dolmage, by his attorney, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered on March 16, 1954.

Opinion Below

The opinion of the Supreme Court of the State of Minnesota is reported in 63 N. W. (2d) 273. The opinion has not as yet been reported in the official state reports.

Jurisdiction

This Court has jurisdiction to review the judgment below under the U. S. C. A., Title 28, Ch. 81, Sec. 1257(3) upon the ground that a right of petitioner under the statutes of the United States was denied below. The judgment below was entered on March 16, 1954.

The decision of the Supreme Court of Minnesota affirming the trial court's decision herein is reviewable under Section 1257(3), *supra*, under the rule of cases such as:

Republic Natural Gas Co. v. *State of Oklahoma*, 334 U. S. 62;
Gospel Army v. *City of Los Angeles*, 331 U. S. 543;
Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69;
Department of Banking v. *Pink*, 317 U. S. 64;

for the reason that it is a final determination of the entire litigation between petitioner and respondent requiring the trial court upon mandate to enter judgment upon the verdict herein as a mere ministerial duty. The effect of the decision of the Supreme Court of Minnesota is a final determination of the litigation which leaves nothing further to be adjudicated or decided and concludes the case and all issues of law and fact therein in favor of respondent and against petitioner.

Question Presented

Did the Supreme Court of Minnesota err in holding that a railroad company engaged in interstate transportation is under no duty to light a path of ingress and egress to a bunkcar in which it lodged its workmen and which was situated in a dark place about 1800 feet from the depot, where the men who were lodged there necessarily had to leave the bunkcar to go to restaurants off the railroad's premises in

order to obtain food, which they did by walking along and across the railroad tracks in the darkness and to return to the bunkcar along the same route.

Statute Involved

The statute here involved is Federal Employer's Liability Act, U. S. C. A. Title 45, Ch. 2, Sec. 51, which reads:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 1, 53 Stat. 1404."

Statement of the Facts

(These Are as Stated in Opinion of Court Below)

Petitioner was employed by respondent as a section laborer. Respondent is a railroad company engaged in transportation of freight and passengers in interstate commerce. Respondent required petitioner as such section laborer to move about from place to place in the performance of his duties. On October 1, 1951, the date of the accident, respondent had assigned petitioner to work in and near Iowa City, Iowa. Respondent provided a bunkcar as a place of lodging for petitioner and others similarly employed. Here the men spent some of their spare time and slept at night.

The tracks in the Iowa City yards extend in a generally east and west direction. There are two main tracks—one for east bound and the other for west bound traffic.

The bunkcar was located near the eastern end of the southermost track more than 1000 feet from the toolhouse, which in turn was 800 feet west of the depot. There was a path from the depot along the outer rail to the bunkcar. The area immediately adjacent to the depot was illuminated with artificial light, but practically the entire distance of 1800 feet from the depot to the bunkcar was unlighted and dark. It was dark on the night in question—so dark that petitioner was not able to see more than two feet ahead and could not see where he was placing his feet as he walked from and back to the bunkcar.

Petitioner, after the day's work and after he had cleaned up in the bunkcar, left the bunkcar and proceeded to a nearby restaurant which was situated off respondent's premises. At about 9 o'clock in the evening and after petitioner had had his dinner in the restaurant, he proceeded to walk back to the bunkcar to sleep there during the night. He

started across the tracks to the bunkcar in the complete darkness. As pointed out, he then could not see more than two feet in front of him or where he was placing his feet. He crossed the west bound main track and the north rail of the east bound track when he stumbled over something and fell on the south rail of the east bound main track. Petitioner does not know what caused him to stumble and fall, but it was some object he was unable to see in the darkness.

There is no serious dispute as to the utter and complete darkness in respondent's yards on the night in question. The evidence with respect to lights for illumination and the darkness is illustrated by the testimony of city police officer, H. Parrott, who testified (R. 142, f. 2 to R. 144, f. 2):

> "Q. I see. This area where Mr. Dolmage was found, is that a light or dark area down there in the night time?
>
> A. In the night time it is dark. On a dark night it is very dark. You get a little light maybe if it is a moonlight night, its a little lighter, but there are no street lights close enough to light up the area.
>
> Q. On this particular night was that a dark night, or do you recall?
>
> A. As I recall it was. I know definitely we had to have our car lights and flash lights too, to get around down there and see what we were doing.
>
> Q. Where, according to your best recollection, would be the nearest street light to the place where this bunkcar was spotted.
>
> A. Dodge and Page, I would say.
>
> Q. And approximately how far would that be from the sleeping car, the bunkcar?
>
> A. Oh, maybe a little over a hundred feet, I suppose, but it would sit back over the hill. There was quite a drop-off there so you wouldn't get much light down there through there from the street light itself.
>
> Q. I take it from what you have just said the tracks themselves are on a lower level than what the street is on which the light is located.

A. Definitely.

Q. Is there much of an embankment going down to the tracks?

A. I believe so. There is quite an enbankment. Well, the Dodge Street Viaduct is just across the way up the street a little ways from Dodge and Page and there is quite a drop there, that's right.

Q. I see. So then I take it from what you have said then that there was no light furnished in this particular area, is that correct?

Mr. Stringer: I will waive the objection.

A. That's right.

Q. Well, do you know whether or not there was any light that was furnished or that was in this particular area?

Mr. Stringer: Again I will waive the objection.

A. I don't think there was any light from any street lights lighting that area.

Q. Do you recall whether there was any light on in the bunkcar?

A. There was not.

Q. Do you recall whether there was any light alongside of the track either on the north or south side of the track?

A. I don't recall of any.

Q. And your best recollection is that it was very dark?

A. That's right.

Q. Well, what is your best recollection as to the lighting there?

A. That the only lighting down there was what we had furnished from the squad car lights and our flash lights."

The trial court submitted the case to the jury upon the theory that it was the duty of respondent to furnish a reasonably safe place in which to perform his duties as such section laborer; and that it was for the jury to determine under all the circumstances of the case whether or

not it was the duty of the respondent to illuminate the premises in order to render them reasonably safe. The charge of the trial court reads as follows: (R. p. 291, f. 1)

> "It will be for you as Jurors to determine first whether the defendant railroad company was negligent in connection with furnishing adequate lighting, such lighting as it is claimed by the plaintiff should have been furnished about the yard, whether there was any negligence in connection with such furnishing of lights or adequate lights under all the existing circumstances at the time in question."

Further, the trial court instructed the jury to determine the proportionate negligence of respondent and the contributory negligence of petitioner. The verdict was that the petitioner's injury was attributable as follows: To the defendant's negligence, 50%; to the plaintiff's negligence, 50%, and returned a verdict in favor of plaintiff for $5000.00 (R. p. 311).

The court below held on the appeal that the respondent was under no duty to light the premises. This holding was predicated in part upon absence of any duty resting on respondent to light the premises, and in part upon the fact that ordinarily petitioner carried a flashlight with him, which he did not have with him at the time of the occurrence of the accident in question.

Specifications of Error to Be Urged

1. The Supreme Court of Minnesota erred in holding that respondent was under no duty to light the premises, where petitioner sustained his injuries, in order to render them a reasonably safe place to work.

2. The Supreme Court of Minnesota erred in considering as a basis for its decision that at other times petitioner had

with him a flashlight which he used to light his way in the darkness.

3. The Supreme Court of Minnesota erred in reweighing the evidence and itself determining that it was not necessary to illuminate said premises in order to make them a reasonably safe place in which to work.

Reasons for Granting Writ

1. The Supreme Court of Minnesota by the decision below has decided a question of substance not heretofore determined by this Court.

2. That the Supreme Court of Minnesota has decided such question in a way which is not in accord with the applicable decisions of this Court.

3. That the Supreme Court of Minnesota has decided such question contrary to the overwhelming weight of authority.

4. The Supreme Court of Minnesota by its decision has adopted a rule which is opposed to that of the Supreme Court of Minnesota in other similar cases and of the courts of appeal in:

Armenia v. *Wyer*, 2 Cir., 210 F. 2d 592;
Pearce v. *Lehigh Valley R. Co.*, 3 Cir., 157 F. 2d 252;
Boston & M. R. R. v. *Cabana*, 1 Cir., 148 F. 2d 150.

5. The decision of the Supreme Court of Minnesota denies to petitioner the rights accorded to him under the Federal Employers' Liability Act as construed and applied by the decisions of this Court.

Conclusion

The writ of certiorari should be granted not only to accord to petitioner important rights which he has under the Federal Employers' Liability Act, but also to establish a precedent under which others similiarly situated may have similar rights accorded to them.

Respectfully submitted,

DONALD A. CHAPMAN,
Counsel for Petitioner.

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CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Summary of Argument

Respondent was guilty of actionable negligence within the meaning of Sec. 51 of the Federal Employers' Liability Act by its failure to light the place where petitioner walked between the bunkcar and the restaurant in order to get his meals for the reason that the failure to light was a breach of respondent's duty to furnish petitioner a reasonably safe place in which to perform his services.

Lillie v. *Thompson*, 92 L. Ed. 73, 68 S. Ct. 140, 332 U. S. 459;

Lavender v. *Kurn*, 90 L. Ed. 916, 66 S. Ct. 740, 327 U. S. 645;

Armenia v. *Wyer*, 2 Cir., 210 F. 2d 592;

Pearce v. *Lehigh Valley R. Co.*, 3 Cir., 157 F. 2d 252;
Boston & M. R. R. v. *Cabana*, 1 Cir., 148 F. 2d 150, cert. den. 65 S. Ct. 1414, 325 U. S. 873, 89 L. Ed. 1991;
Crawford v. *Duluth, Missabe & Iron Range Railway Co.*, 220 Minn. 225;
Luthy v. *Terminal R. Ass'n of St. Louis*, Case No. 42514 of the Supreme Court of Mo., Div. No. 2, decided Nov. 12, 1951, 243 S. W. 2d 332.

Argument

A question was raised upon the appeal to the State Supreme Court as to whether or not petitioner was engaged in the course of his employment during the time he went from the bunkcar to the restaurant off respondent's premises for the purpose of obtaining food and his return therefrom to the bunkcar. The Supreme Court of Minnesota did not decide that particular question, but assumed that petitioner was, during such time, within his employment and that respondent owed him during such times the duties of an employer under the Federal Employers' Liability Act. Cases involving this question are: *Mostyn* v. *Delaware L. & W. R. Co.*, 2 Cir., 160 F. 2d. 15, and *Moore* v. *Minneapolis & St. L. R. Co.*, 123 Minn. 191, holding in the affirmative, and *Atchison, T. & S. F. R. Co.* v. *Wottle*, 10 Cir., 193 F. 2d. 628, holding in the negative.

The darkness through which petitioner had to walk in going from the bunkcar to the restaurant for the purpose of obtaining food and returning therefrom to the bunkcar made walking through that area dangerous for the reason that under the circumstances a person would be unable to see various objects over which he would be likely to stumble and fall. Petitioner, because of the complete darkness, on the night in question, as the evidence shows, could see only two feet ahead of him and could not see where he was

placing his feet and was unable to see objects present in the path which he pursued. He stumbled over some object because he was unable to see it.

I

It Was the Respondent's Duty to Light the Premises as Part of Its Duty to Furnish a Safe Place to Work

This Court has held that one of the duties of a railroad employer under the Federal Employers' Liability Act is to furnish a reasonably safe place in which the employees are required to do their work.

Lillie v. *Thompson*, 92 L. Ed. 73, 68 S. Ct. 140, 332 U. S. 459.

Lavender v. *Kurn*, 90 L. Ed. 916, 66 S. Ct. 740, 327 U. S. 645.

Armenia v. *Wyer*, 2 Cir., 210 F. 2d. 592.

Pearce v. *Lehigh Valley R. Co.*, 3 Cir., 157 F. 2d. 252.

Boston & M. R. R. v. *Cabana*, 1 Cir. 148 F. 2d. 150, cert. den. 65 S. Ct. 1414, 325 U. S. 873, 89 L. Ed. 1991.

Crawford v. *Duluth, Missabe & Iron Range Railway Co.*, 220 Minn. 225.

Luthy v. *Terminal R. Ass'n of St. Louis*, Case No. 42514 of the Supreme Court of Missouri, Div. No. 2, decided Nov. 12, 1951, 243 S. W. 2d. 332.

In the *Lillie* case, supra, liability was predicated upon the combined failure to light and police, where such factors rendered the place in which the employee performed her duties an unsafe one.

In the *Lavender* case, supra, the failure of the railroad to light made the place where the employee was required to perform his services dangerous, for the reason that a car passing him had a swinging hook which he could not see but which hit him and killed him.

In the *Armenia* case, supra, failure to light rendered the place where the plaintiff was required to perform his work unsafe. In that case the Court said (210 F. 2d. 595):

> "Neither did the Court err in not dismissing the action based on the second accident on the grounds that there was insufficient evidence of actionable negligence to justify a verdict for the plaintiff. To recover under the Act, the plaintiff must, of course show negligence. Moore *v.* Chesapeake & Ohio R. Co., 340 U. S. 573, 575, 71 S. Ct. 428, 95 L. Ed. 547. The facts and inferences therefrom, viewed in the light most favorable to the plaintiff, show that the plaintiff was working *on a dark, dismal, drizzly night in an unlighted freightyard;* that while in the conduct of his employment he was stationed atop of the westerly boxcar of a series of four or five freight cars that were being pushed towards the west end of the freight yard; that he was hit by a cable that hung three or four feet above the top of the boxcar upon which he was riding and because he was hit, he was knocked down on top of the freight car, striking his head a severe blow. There is ample evidence from which the jury could find that in fact the cable was drooping as low as the plaintiff claims. The plaintiff so testified, and so did his companion brakeman, Patterson."

In *Boston & M. R. R.* v. *Cabana*, 1 Cir., 148 F. 2d. 150, the Court held that the failure to light the area in the vicinity of a roundhouse where employees were required to perform their work supported the finding of negligence upon the theory that thereby the railroad had failed to provide a reasonably safe place to work. The Court said:

> "There is substantial evidence which would warrant the jury's finding that the defendant negligently failed to maintain the lighting system in that area of the engine house with which we are concerned. * * * the jury could infer from the testimony that with the exception of a few lights at the head of Pit 48, most

of the 14 fixtures were not in working order owing to corrosion of the sockets or burned out bulbs.

* * * There was substantial evidence as to the failure of these lights to function, from which the jury could infer that the defendant, apart from its efforts to comply with the dim-out regulations, was negligent in the maintenance of such lighting facilities as were permissible under the regulation. (148 F. 2d. 152-153).

Whether or not he was in a position to see the plaintiff, the evidence clearly warrants a finding that if there had been adequate lighting the plaintiff would have been able to see the backing engine in time to get out of the way. (148 F. 2d. 154)."

In *Crawford* v. *Duluth, Missabe & Iron Range Railway Co.*, supra, the Supreme Court of Minnesota said:

"The evidence was in dispute as to whether the place where the decedent fell through was properly lighted. Plaintiff's evidence showed that the closest lamp was about 20 feet distant and that the light there 'was not so good.' This was disputed by the defendant. * * * (220 Minn. 229).

The master owes the servant the duty of exercising reasonable care to furnish a safe place to work. The duty of furnishing a safe place to work includes that of furnishing light when necessary to make the place where the work is being done reasonably safe. This duty commonly arises where the work is being done at night, and the failure to provide light unreasonably exposes the servant to danger of harm. Where the duty is undertaken by the master, he is liable for injuries to the servant proximately resulting from defective lighting. Carlson *v.* G. N. Ry. Co., 106 Minn. 254, 118 N. W. 832; Forseth *v.* Iron River Lbr. Co., 142 Wis. 87, 124 N. W. 1036; 3 LaBatt, Master and Servant (2 Ed.) Sec. 1005; 39 C. J., Master and Servant, Sec. 469.

* * * In Bausert *v.* Thompson-Starrett Co., 126 App. Div. 332, 110 N. Y. S. 521, it was held that a

master engaged in the construction of a large building owes his employees the duty of lighting the place so as to enable them to observe dangers. * * * (220 Minn. 230-231).

It was defendant's duty, because of the great and unusual danger incident to the work, to use all appliances reasonably attainable to prevent accidents. Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464; 2 Shearman and Redfield, Negligence (Rev. Ed.) Sec. 197. Here, defendant * * * was able by taking reasonable precaution to prevent accidents by providing proper light. This duty it recognized and attempted to discharge, but in such a negligent manner that the light furnished was inadequate. If adequate light had been furnished, decedent might have been able to observe the defects, if any, in the tie on which he slipped, causing him to fall. See Bruns *v.* Northern Iowa Brick & Title Co., 152 Ia. 61, 130 N. W. 1083, supra. Because there is evidence to show that defendant furnished inadequate light and that the failure to properly light might have been the cause of decedent's failure to observe the condition of the tie on which he stepped, defendant's negligence was a fact question for the jury.

Whether decedent was guilty of contributory negligence and to what extent, if any, were, under the circumstances, fact questions. Boyle *v.* Degnon-McLean Const. Co., 47 App. Div. 311, 61 N. Y. S. 1043, supra. (220 Minn. 232-233)."

In *Luthy* v. *Terminal R. Ass'n of St. Louis,* (Mo., S. Ct. Div. 2, 243 S. W. 2d. 332), plaintiff was injured by tripping over a switch-operating mechanism which he could not see because of the darkness where he was required to do his work. The defendant was held guilty of negligence for failure to light and to render the place a safe one in which to work. The Missouri Court said:

"There was ample testimony to submit the question whether the place where respondent was injured was

illuminated. He testified it was dark; that there were no light standards or light beams in the immediate vicinity, and no lights on the ground or marker lights with reference to the switch points. Other testimony established that floodlights were installed at places in appellant's yards, although not universally; that no floodlight was in the immediate vicinity of the place respondent was injured; that the switch mechanism was painted black and was black, and that painting it with a luminous paint would have caused it to glow in the dark.

And, in considering an instruction to the effect, in part, that 'the jury could find for plaintiff if it was practicable to have lights which would reveal the position of the switch and defendant negligently failed to have such lights,' Derrington *v.* Southern R. Co., 328 Mo. 283, certiorari denied, 284 U. S. 662, 52 S. Ct. 37, 76 L. Ed. 561 states: 'The evidence shows it was a dark night. As a matter of common knowledge, lights could have been placed somewhere high enough or suspended in some sort of position so as to show the position of the switch. If it was the custom, as testified to by defendant's witnesses, to leave the tracks aligned as last used, and if it was dangerous for cars backing in from the east on track B-6 and other tracks to be switched onto the cross-over, then it was for the jury to say whether the defendant was negligent in failing to have such lights. * * * But if there was no such custom, it was for the jury to say whether ordinary care required defendant to have lights so that operatives driving cars on B-6 would know how the switch was turned, and it was for the jury to say whether such lights were practicable.' See also Lavender *v.* Kurn, 327 U. S. 645, 651, 66 S. Ct. 740, 90 L. Ed. 916, on the issue submitted against the Illinois Central R. Co.; Boston & M. R. R. *v.* Cabana, 1 Cir., 148 F. 2d 150, 152, certiorari denied; Pearce *v.* Lehigh Valley R. Co., 3 Cir., 157 F. 2d 252, 253.

Texas & Pac. R. Co. *v.* Behmeyer, 189 U. S. 468, 470, 23 S. Ct. 622, 623, 47 L. Ed. 905, states: '* * * what

ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' See Bimberg *v.* Northern Pac. Ry Co. 217 Minn. 187, 14 N.W. 2d 410, 413, certiorari denied, 323 U.S. 752, 65 S. Ct. 87, 89 L. Ed. 602. Under the above authorities the evidence presented a jury issue whether a reasonably prudent master would have marked the black switch operating mechanism in some manner, by illumination or otherwise, for the protection of servants discharging the duties of switchmen in its vicinity in the nighttime. * * *

Affirmative testimony as to what caused him to trip and the surrounding circumstances, whether the submitted negligence of appellant proximately contributed to cause his fall and injury was clearly for the jury." (243 S. W. 2d 336-37).

Failure to Light as Constituting Negligence in Other Than Federal Employers' Liability Cases

The rule seems to be almost universal that where darkness renders walking in a given place dangerous, or at least attended with danger, a duty on the part of the possessor of the premises arises to light in order to render the place safe, and the failure to perform that duty constitutes negligence.

Master and Servant Cases

Devaney v. *Degnon-McLean Const. Co.,* 79 App. Div. 62,178 N. Y. 620.

Bruns v. *Northern Iowa Brick & Tile Co.,* 152 Ia. 61, 130 N. W. 1083.

3 LaBatt, Master and Servant, 2nd Ed. 2681, Sec. 1005.

Other Types of Cases

The rule is also applied in such cases as landlord and tenant, possessor and invitee of premises:

Iverson v. *Quam, et al.,* 226 Minn. 290.

McGenty v. *John A. Stephenson & Co.*, 218 Minn. 311.
Bixby v. *Minneapolis, Northfield & Southern Ry. Co.*, 204 Minn. 316.

In the *Bixby* case the Court said (204 Minn. 317-319):

"We think the first contention cannot be sustained since the evidence shows that plaintiff did not fall on a rough and irregular slope. She fell where it was level but perhaps uneven by reason of the protruding rocks. Ordinarily it would have been safe for a person to walk there. For purposes of decision we shall assume that the place was free from defects and obstructions. A common carrier of passengers is under the duty to exercise reasonable care to keep its depot, platforms, and approaches in safe condition for the use of passengers, and this duty includes proper lighting at night, for breach of which it may be found guilty of negligence. Buenemann v. St. P. M. & M. Ry. Co., 32 Minn. 390, 20 N. W. 379; T. & P. Ry. Co. v. Stewart, 228 U. S. 357, 33 S. Ct. 548, 57 L. Ed. 875; Fordyce v. Merrill, 49 Ark. 277, 5 S. W. 329. This duty may not be fully discharged by providing a reasonably safe depot, platforms, or approaches. The carrier may be under an additional duty to light the premises if a passenger is subjected to danger by the use of them in the dark. Duell v. C. & N. W. Ry. Co., 115 Wis. 516, 92 N. W. 269. The question is one of fact in each case because there is no absolute test of what constitutes negligence in a case of this kind. In Patten v. C. & N. W. Ry. Co., 32 Wis. 524, 531, the Court said: 'Whether there was a want of such care and prudence as the company should exercise in the particular case, in not having a light in or about the depot when the plaintiff left the train, is not a pure question of law, but rather one of law and fact.' The jury had a right to consider the distance of the depot from the street, Patten v. C. & N. W. Ry. Co., supra, and the unevenness of the surface due to protruding rocks with the consequent danger of slipping and stumbling in connection with the darkness in de-

termining whether defendant exercised reasonable care. A place free from structural defects and otherwise safe may be dangerous to use if not lighted. Barrett v. Van Duzee, 139 Minn. 351, 166 N. W. 407. In the cited case we held that the owner of a theatre may be found guilty of negligence solely for failure properly to light a stairway free from defects in consequence of which a patron slipped and fell. In Duell v. C. & N. W. Ry. Co., supra, the Supreme Court of Wisconsin applied the rule to a similar situation involving the duty of a carrier to a passenger. To the same effect, Poppleston v. Pantages Minneapolis Theatre Co., 175 Minn. 153, 220 N. W. 418. In Albachten v. The Golden Rule, 135 Minn. 381, 160 N. W. 1012, we held that the owner of a store might be guilty of negligence in failing properly to light a hallway even though the hallway might be properly constructed and free from obstructions."

II

Petitioner's Ownership of a Flashlight and Use Thereof at Other Times Does Not Relieve Respondent of Liability

The Court below placed great emphasis upon the fact that the petitioner owned a flashlight which he used at other times and which he usually took with him. He used this flashlight on other occasions to light his way through the darkness where respondent had failed to illuminate the area through which he had to walk, not only at Iowa City, but at other places. On the occasion in question petitioner did not have the flashlight with him. He had forgotten it and left it at his home in Oxford, Iowa.

There was no agreement or arrangement between respondent and petitioner by the terms of which petitioner agreed to have the flashlight with him for the purpose of providing his own light. If there had been such an arrangement it would have been illegal and void under Sec. 55 of the Federal Employers' Liability Act as a "contract, rule,

regulation or device" to enable the respondent to exempt itself from liability created by the Federal Employers' Liability Act to provide a reasonably safe place in which petitioner was to work. Although the lower court does not expressly say so, the effect of its discussion of the flashlight is that petitioner, by his failure to have the light with him and then venturing into the darkness, in effect assumed all the risks incident thereto and was guilty of assumption of risk. This is contrary to Sec. 54 of the Act which abolished the doctrine of assumption of risk in such cases. This Court has many times said that the 1939 Amendment has abolished "every vestige" thereof.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;

Owens v. *Union Pac. R. Co.*, 319 U. S. 715, 87 L. Ed. 1683;

Urie v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

Errors in the Decision Below

The fundamental error in the decision below is that it holds that the duty to provide a safe place to work within the meaning of the Federal Employers' Liability Act does not comprehend also a duty to light the place where the work is done, if that be necessary to make it safe. A further error of the decision below is the treatment of petitioner's conduct as involving some sort of arrangement by which respondent was relieved of its duty to light by reason of the fact that petitioner had the flashlight, and also that petitioner's venturing into the darkness without the flashlight under the circumstances was a sort of assumption of risk, even though it was not labeled by the court below as such.

The decision of the Supreme Court of Minnesota was

erroneous for the reason that it held as a matter of law that respondent owed to petitioner no duty to light the premises in question in order to furnish petitioner a safe place in which to work. We think that under the evidence this presented a fact question for the decision of the jury and that the Supreme Court erred both in the legal rule announced and also in determining the question as one of law rather than as one of fact to be decided by the jury.

Lavender v. *Kurn*, and other cases cited, *supra*.

The verdict of the jury was based upon both the correct rule of law, which the trial Judge announced in its instruction to the jury, and upon the evidence in this case by applying thereto the rule announced in the instruction. Thus the jury resolved the question in favor of petitioner. Petitioner is entitled, as a matter of federal law, to have the question decided by the jury and not by the Court.

Dice v. *Akron, Canton & Youngstown RR. Co.*, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312.

Conclusion

For the reasons stated this Court should grant certiorari to review the decision of the Supreme Court of Minnesota. We think upon such a review this Court will reverse the decision of the Supreme Court of Minnesota.

Respectfully submitted,

DONALD A. CHAPMAN,
Counsel for Petitioner.

JUL 12 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM

1954

No. 113

FRANK DOLMAGE,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CApitol 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApitol 2-2701

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OPINION BELOW

The opinion of the Supreme Court of Minnesota is reported in 63 N. W. (2d) 273. It has not yet appeared in the official reports.

QUESTION PRESENTED

Whether the Supreme Court of Minnesota correctly held:

1. That proof of some negligence on the part of the defendant, which proximately caused or contributed to plaintiff's injury, was requisite to a recovery under the Federal Employers Liability Act.

2. That there was no duty on the part of an employer to illuminate artificially an entire freight yard which is used only for daytime operations, for the sole benefit of one employee who traverses the same rarely and for his own purposes only—particularly where the need for illumination arises only when he forgets the flashlight which he ordinarily carries.

While the court below decided the case upon the absence of any negligence on the part of the defendant, there are two other grounds, which respondent urged below, upon either of which the decision below could as readily have rested; but the Minnesota Supreme Court did not pass upon either. These are:

A. Whether the petitioner, who was on his way from supper to bed when injured, and whose last service had been five hours before, and whose next would be ten hours later —was under the Federal Employers Liability Act at all, merely because he was traversing his employer's premises.

B. Whether the petitioner's negligence, found by the jury to exist, and which was the immediate cause of all of the events of which he complained, was the sole proximate cause of his accident.

STATEMENT OF FACTS

The statement of facts in petitioner's petition is neither a fair nor a complete one, because it omits the most essential features of the case, including particularly those upon which the Minnesota Supreme Court based its decision.

Petitioner was a member of a floating section crew (R. 19, f. 2) which was working at a point a few miles out of Iowa City, Iowa. (R. 24, f. 1). Working hours were seven A.M. to four P.M. (R. 26, f. 2). Respondent provided, gratuitously (R. 53, f. 2), a bunk car which supplied cooking and sleeping facilities (R. 226, ff. 2-3) to such members of the crew as wished to avail themselves of it. (R. 54, f. 2). The accident in question occurred October 1, 1951. About the middle of August, or some seven weeks before the accident, respondent had placed this bunk car in the southeasterly corner of its freight yard at Iowa City. (R. 20, f. 3) The yard consists of six parallel tracks, running East and West. (R. 18, f. 1). The two most northerly are the main lines; the other four are yard or switching tracks. The bunk car was at the East end of the most southerly yard track. Petitioner had used it there about a month before the accident; (R. 28, f. 2; R. 54, f. 2) but from then until the time of the accident it had remained vacant. Only petitioner intended to use it. (R. 28, f. 1; R. 53, f. 3).

At or near the northwest corner of the freight yard is the tool house, which was the local headquarters for his crew; and some distance west of the tool house is the passenger depot. Petitioner, at the close of his day's work, separated from his crew and foreman at the tool house. He then proceeded, by daylight, to the bunk car where he changed his clothes. (R. 29, f. 1). He then discovered, consciously and affirma-

tively, that he had forgotten to bring with him the flashlight which he ordinarily carried with him and which the customs of his employment demanded that he have. It was still daylight, shortly before six P.M. Petitioner then went out for supper, which he ate at a restaurant near the passenger depot. After supper he went to the passenger depot where he waited until after nine P.M. when total darkness had fallen. At that time, he decided to return to the bunk car to go to bed; and it was while traversing the yard for that purpose that the accident occurred. He admitted that he had had ample time and opportunity to acquire a flashlight or other light; but he made not even the slightest effort to get hold of one either by purchase of another or by borrowing a light; his only excuse was that he did not feel like walking some six blocks to the nearest drug store (R. 62, f. 3; R. 63) but figured that he could find the car all right (R. 64, f. 1). He had a distance of about 1000 feet to go from the tool house to the bunk car (R. 29, f. 3). The accident occurred about twenty feet from the tool house (R. 66, f. 1). From there, there was no special path or route. As petitioner himself testified (R. 43, f. 2):

> Q. "When you arrived at the tool house, is there any pathway across the tracks to use to get to the bunk car?"
>
> A. "No, you just have to walk across the tracks."

There was, therefore, not even any particular route, pathway, or limited area which is involved. Petitioner's claim in the courts below was that respondent should have floodlighted the whole yard (used only in the daytime) for the sole benefit of such use (perhaps once a month) as he might wish to make of it for his own personal purposes.

Petitioner's injury was received when he stumbled in the darkness over what was probably a rail. (R. 67, ff. 1-2). No train movement is involved in any way. (R. 67, f. 3; R. 68, f. 1). No defect in the rails, ground, track or road bed was claimed: petitioner himself had been over this same route (R. 57, f. 3) by daylight (R. 57, f. 1) only a few hours before the accident and observed, and claims, no defective condition whatever. (R. 58, f. 1). The sole question was whether the defendant-respondent was under a duty to furnish artificial illumination to an entire railroad yard, solely to assist one man (R. 68, f. 2) to use it, for his own exclusive benefit, as a thoroughfare.

Petitioner himself admitted that there was no reason whatever so far as any railroad operation is concerned, for illuminating the yard, since it was used only in the daylight hours. He said (R. 51, f. 1):

Q. "And so there is no—so far as any operations in the yard are concerned, there is no occasion for flood-lighting the yard or anything of that kind?"

A. "No."

The only possible remaining reason there could be for flood-lighting the yard would be for the benefit of one such as petitioner (in fact only for petitioner, since the existence of no one else in his status was even suggested) who might wish to use the yard, not as a yard but as a thoroughfare perhaps once a month—and then would need or want artificial illumination only if he happened to forget the flashlight which he ordinarily carried (R. 50, f. 2; R. 51, f. 3), and which was all he needed (R. 79, f. 1).

Respondent had no duties of any kind to perform either at the time or place where his injury was received. (R. 52, f. 3)

It was he who selected the time and place. He was not on pay time and was under the orders and control of no one but himself. He was on his own time, could do anything he pleased, and could go anywhere he wanted (R. 53, f. 1-2). His sole duty was to report back to work at the tool house at seven A.M. the following morning (R. 52, f. 3).

More than half of the statement of facts in the petition is consumed by a quotation showing that at the place the bunk car was located, and where petitioner was found by the city police, it was quite dark. This is an admitted, but wholly irrelevant fact: immaterial because the accident did not occur at the bunk car nor anywhere near it, but at the diagonally opposite corner of the yard 1000 ft. away (R. 29, f. 3) and not far from a city arc light, where the view at night is substantially that which appears in Exhibit M (R. 176 A). The evidence of the police officer quoted at pages 5-6 of the petition related to a place about 1000 feet away from that where the accident happened.

Admittedly no artificial lighting of the yard area was furnished by the respondent—except around the depot, and that was well "lit up" according to petitioner (R. 41, f. 3). No reason whatever for flood-lighting was advanced, and no showing of any kind made that a flood-lighting system would serve any useful purpose whatever. The court below held that there was no duty to illuminate artificially such an area; and, no other claim of negligence having been advanced, the court below held that negligence which was essential to a recovery had not been shown. Judgment in favor of respondent was accordingly ordered by the mandate issued to the trial court on March 16, 1954.

REASONS FOR DENYING THE WRIT

1. The decision of this case rests upon its own particular facts.

2. There is no important principle of law which is involved in this case.

3. The question decided by the Minnesota Supreme Court was decided in full deference to and in accord and harmony with the decisions of this court, and in harmony with the overwhelming weight of authority.

4. The decision of the Minnesota Supreme Court accords to petitioner every right, even under the most liberal interpretation, which he might have or claim under the Federal Employers Liability Act.

ARGUMENT

1. Railroads Are Not, Under the Federal Employers Liability Act, Insurers of Their Employees.

It is apparent that this case is another attempt to provoke a ruling from this court to the effect that the Federal Employers Liability Act is but a Workmen's Compensation Act, and the railroad an insurer of its employees—the proposition announced by Judge Major of the 7th Circuit in *Griswold vs. Gardner,* 155 Fed. (2d) 333, but rejected by the majority of that court and by all of the several opinions of this court—the majority, and the concurring, and the dissenting opinions— in *Wilkerson vs. McCarthy,* 336 U. S. 53, 69 Sup. Ct. 413.

This case is, from plaintiff's standpoint, weaker than any other case brought here in recent years under the Federal Employers Liability Act. There is no dispute of any moment as to the evidence. No element of speculation or conjecture is involved: no jury has been asked to reconstruct evidence otherwise shrouded in uncertainty or mystery. The burden of proof is not involved. Every important factual feature of this case comes from the evidence of petitioner himself; and it is really not necessary to refer to the evidence of any witness other than petitioner. This is a bare case of an off-duty employee sustaining an injury from stumbling in the dark; and, solely because he stumbled, claiming that the darkness should not have existed. No showing was made, or attempted, of any duty to light up the area involved. No reason why it should have been lighted was advanced. No rule or statute requiring lighting was cited nor is any cited now. There was no evidence of any kind, expert or otherwise, tending to show the duty for, need for or desirability of the lighting of this area.

In short we have a simple case here of a man stumbling in the dark: period. Only by taking literally the dictum of the Griswold case, repudiated here, and by holding that railroads are in truth insurers of their employees, is there any substantial basis for petitioner's claim for a recovery. This hypothesis was so completely exploded by this court in *Wilkerson vs. McCarthy,* supra, that there is no need to re-examine that topic.

2. No Issue of Negligence was Raised by the Evidence.

The petition for a writ here cites a number of cases, all to the effect that it may be a duty (breach of which might be negligence) to light up areas, structures or objects where:

1. There are substantial reasons, of which the defendant is or should be aware, for furnishing illumination in the interests of safety; and

2. The place or object is sufficiently limited or defined so that lighting would be practicable.

Neither of these conditions prevailed in the instant case; but in every case cited by petitioner both of them prevailed:

In *Lillie vs. Thompson*, 332 U. S. 459, 68 Sup. Ct. 140 a female telegraph operator was sent to a lonely yard office in an isolated part of the railroad yard. It was not only unlighted but was unguarded and there was not even a window through which she might identify those seeking to gain admission. Defendant had actual knowledge that the area was frequented by dangerous characters, one of whom knocked on the door and upon admission assaulted her. Summary judgment of dismissal was reversed by this court upon the ground that, if the facts pleaded could be shown a case might be made out.

In *Armenia vs. Wyer*, 2 Cir., 210 F. 2d 392, plaintiff was a brakeman riding on the roof of a freight car in an unlighted yard, when he was swept off by a cable crossing the track only three or four feet above the car. There had been no inspection for over six weeks. Naturally the court held that a jury issue as to negligence existed.

In *Pearce vs. Lehigh Valley R. Co.*, 3 Cir., 157 Fed. (2d) 252 plaintiff was a machinist helper in its round house, and fell off the cat-walk of an engine owing to the darkness. Flood-lights adequate to illuminate the cat-walk had once existed but had been removed for no assigned reason. The cat-walk is a narrow thoroughfare along the side of a boiler of a steam engine sufficiently high so that a fall might be dangerous and sufficiently small so that illumination would be quite practical. A jury issue was held to exist.

Boston & M. R. R. vs. Cabana, 1 Cir., 148 Fed. (2d) 150 (Cert. den. 325 U. S. 873, 65 Sup. Ct. 1414) is another interior round house case where there was not only no adequate light within the round house but none on the tender of an engine which was backing into it. Although there were fourteen light fixtures most of them were out of order, and none of them were working. It was held that there was a jury issue whether due care required lights and whether adequate lights had been supplied.

In *Lavender vs. Kurn*, 327 U. S. 645, 66 Sup. Ct. 740, the employee was struck by a mail crane on a passing train while in a very dark place consisting of high and uneven ground. A jury issue was held to exist.

In *Crawford vs. D. M. & I. R. R. Co.*, 220 Minn. 225, 19 N. W. (2d) 384, (which the court below cites in its opinion), the Minnesota court held that a jury issue existed as to the duty of an employer to illuminate the deck of an ore dock some seventy feet above the ground where there were apertures through which an employee might fall to his death.

Luthy vs. Terminal R. Ass'n of St. Louis, (Missouri 1951) 243 S. W. (2d) 332, is stressed by the petitioner and is interesting because it shows where the line in such matters should be drawn: It presents the almost exact opposite

of the case at Bar. The Missouri court there introduces its discussion by taking judicial notice of the fact that the St. Louis Union Station yards where the accident occurred are among the largest and busiest in the United States; and that running trains through them is a complex business fraught with hazards and imposing the duty to adopt all reasonable measures to avoid unnecessary danger. In this yard and while attempting to board a moving train, the plaintiff there was running along side the track when he tripped over the air valve housing or pipes forming a part of the switch operating mechanism. There were no lights at all in the vicinity, and the court holds a fact issue to exist as to whether a reasonably safe place to work had been supplied.

It should be perfectly obvious that none of these cases are remotely in point with the issues here—unless upon the ground that they demonstrate the opposite of the situation which we have here, or unless it can fairly be said that every case which involves lighting in any way is in point. In each of the cases referred to there was:

(1) A special and very good reason why lights should have been furnished. (In the *Lillie* case it was the specific knowledge of the disreputable area, and lighting was but the smallest incident; in the *Lavender*, *Armenia* and *Luthy* cases, the accidents occurred in very busy operating yards during operating hours, as a result of a train movement, combined with obstructions concealed by the darkness. It was the presence of the obstructions that was the principal point in each case and the darkness was merely incidental. The *Pearce* and *Cabana* cases involved small but dangerous places in the interiors of round houses where the employee was required to go in the performance of his duty. The *Crawford* case, involving as it does a structure seventy feet off the

ground, bears not the slightest resemblance to the facts here.)

(2) In each of these cases the railroad could readily and should easily have anticipated that something of the kind that actually did happen might occur.

(3) In each of these cases artificial illumination would have been entirely practical, and could readily have been supplied.

No showing of the existence of any conditions analogous to the above was even attempted in this case. The yard here is closed down at night. No train movement is or could have been involved. Respondent did not require petitioner to enter the yards at all, much less to follow any particular route or to do any particular thing. He was on his own time and could take all evening to get to the bunk car if he chose, or he could follow any route (of which many were available) which his fancy chose.

To illuminate a general area, merely because of the bare possibility that someone might choose to go there, although no one is required to do so in the performance of his duties, is nothing less than preposterous; and yet that is what petitioner is asking this court to hold that respondent should have done. There are, of course, plenty of cases holding that negligence may consist of failure to illuminate a specific place, area or thing. That is true, but that is not the point. In every instance where any court has held negligence to consist of the failure to light something, there has been some specific reason why lighting should have been furnished, and the place or thing in question has been sufficiently definite and identifiable so that illumination would be practical. There is no case—at least petitioner cites none, and we know of none—holding that lighting is to be supplied merely for its own sake. Neither is any case cited nor does it exist,

holding that the duty of anticipation extends so far into the field of clairvoyance that one must foresee that another will forget the light which he ordinarily carries with him and, after the matter is specifically drawn to his attention, elect deliberately against acquiring another when he has both the time and opportunity to do so. To extend the duty of anticipation so far beyond ordinary human experience would truly be to render the employer an insurer, which this court has specifically held that he is not.

3. There are Two Additional Grounds Upon Which the Decision of the Minnesota Supreme Court Could Properly have been Based.

The Minnesota Court reached its conclusion on the ground that there was no negligence on the part of the defendant; the court therefore was not required to pass upon two other points, both rather obvious and both established by the evidence of the petitioner himself: (A) That petitioner was not in the course of his employment at the time of his accident. (B) That his own contributory negligence, found by the jury in its special verdict to exist (R. 311, f. 3) was the sole cause of his mishap.

(A) Petitioner was, as already mentioned, on his way from supper to bed. He was under no one's orders or control. He was not on pay time. He had performed no service for respondent for five hours and would perform none for another ten hours, when he would report for work at seven A.M. the following morning. All of this he freely admits (R. 52, f. 3). He also makes it entirely clear by his own evidence that he was on his own time and could do anything and go anywhere he pleased (R. 53, ff. 1-2). His use of this

bunk car was a pure gratuity which he could take or not as he pleased (R. 54, f. 2).

The court below could have rested its decision on the rather obvious fact that the petitioner was not under the Federal Employers Liability Act at the time of his accident, as the 10th Circuit has recently held (*A. T. & S. F. Railway vs. Wottle,* 10 Cir., 193 Fed. (2d) 628). However, in view of the conflict of that case and *Mostyn vs. D. L. & W. R. Co.,* 2 Cir., 160 Fed. (2d) 15, the court below assumed, without deciding, that he was under the act, thus giving petitioner the benefit of the doubt.

(B) It seems entirely obvious also that the negligence of the petitioner which the jury found, was the sole proximate cause of his accident and the court below could well have based its decision on the ground also. At six P.M. he discovered, positively, that he had forgotten his flashlight. He testified (R. 63, ff. 2-3):

Q. "Then you made the discovery you had forgotten your flashlight when you were opening or closing up your suitcase in the bunk car?"

A. "Yes."

Q. "After or about the time you were changing your clothes?"

A. "I just opened the suitcase to take things out, and that is the first thing I thought of when I opened it."

Q. "At that time you noted you didn't have it with you?"

A. "I knew I had forgotten it."

Q. "Did you have any intention of buying another flashlight?"

A. "Well, if there was a drug store or some place I didn't have to walk so far I would have bought another one."

Q. "About how far would the nearest drug store be from the depot?"
A. "I would say about six blocks."

And the reason he didn't go to get another was that he didn't feel like walking that far (R. 62, f. 3) so he waited until nine P.M. in or around the passenger depot (R. 63, f. 3).

Nothing could be clearer than that petitioner's

(1) Negligence in forgetting to bring his flashlight
(2) Positive discovery of that fact
(3) Opportunity to acquire another, and
(4) Deliberate election not to do so:

turned the course of events into occurrences which not only respondent could not possibly be called upon to anticipate but also set in motion an entirely and completely independent series of happenings: namely, petitioner's accident and its consequences. It seems almost impossible to imagine a clearer case of intervening causation and of plaintiff's own deliberate acts being the sole cause which severs the chain of causation. *Reynolds vs. Atlantic Coast Line,* 336 U. S. 207, 69 Sup. Ct. 507. *Great Northern Railway vs. Wiles,* 240 U. S. 444, 36 Sup. Ct. 406. *Gill vs. Penn. R. R.,* 3 Cir., 201 Fed. (2d) 718. *Wolfe vs. Henwood,* 8 Cir., 162 Fed. (2d) 998 (cert. den. 332 U. S. 773, 68 Sup. Ct. 88).

This case is not, in principle, distinguishable from *Atlantic Coast Line vs. Craven,* 4 Cir., 185 Fed. (2d) 176 (cert. den. 340 U. S. 952, 71 Sup. Ct. 571). There the plaintiff found his way across the railroad yards blocked by a slowly moving cut of cars. Rather than wait, he decided to climb over the cars and fell off and was injured. He claimed the railroad to have been negligent in not having built a bridge over the

tracks. Although lighting is not involved, the principle involved is identical with that here: namely, whether a railroad shall be required to make an extremely expensive installation (and if it does not, to be held negligent for failure to do so) where the sole purpose of the installation proposed would be to make some slight contribution upon rare occasions to the personal convenience of an employee. In the *Craven* case the claim was that the railroad should have built a bridge over the tracks so the employee would not be required to wait a few minutes for a train to pass. In this case the claim is made that the railroad should flood-light an entire yard, so as to save the employee the bother of walking a few blocks to buy a flash light which he needs only on the rare occasions when he forgets the one he usually has. The 4th Circuit in the *Craven* case disposed of the contention in very apt language which would need only a little paraphrasing to fit exactly this case. The court there said:

> "A complete rearrangement of the yard, a bridge or a tunnel, or some system of traffic regulation might have prevented this accident. The great majority of railroad accidents (including those not involving negligence) could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger. . . Under the Federal Employers' Liability Act, the common law rule of ordinary prudence maintains, and a railroad is not necessarily required to employ the latest or the safest devices. . . We do not see how ordinary prudence could have required the construction of a bridge or a tunnel, or the disruption of the railroad's activities suggested by the plaintiff. That remedy would have been all out of proportion to the risk involved. The remedy was with plaintiff, and lay merely in the exercise of that standard

> of personal safety that he had been instructed to use. . . It would have been unreasonable to expect the railroad to take those extreme measures necessary to remove this slight danger. The railroad's duty did extend to the removal of all dangers reasonably to be anticipated as an incident of plaintiff's employment but this duty was fulfilled when the railroad had defined the dangers to plaintiff and instructed him how to avoid them."

To almost identical effect, see the opinion of Judge Goodrich in *Eckenrode vs. Pennsylvania R. Co.*, 3 Cir., 164 Fed. (2d) 996, affirmed by this court in 335 U. S. 329, 69 Sup. Ct. 91.

CONCLUSION

This case rests on its own particular facts not likely to be repeated. The Minnesota court decided it upon the most obvious ground—lack of negligence—but there are two other grounds equally as good which could as readily have been used. The decision is based upon a correct application of the rules of law announced by this court; and, if a writ were to issue, an affirmance would be expected.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1954.

No. 113

FRANK DOLMAGE,

Petitioner,

vs.

CHICAGO, ROCK ISLAND and PACIFIC RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent has stated some additional facts which we think in no way add to the presentation of the petition to this Court. Some of the arguments which defendant makes are, however, absolutely unfair. For example, on page 7 of its brief it contends that to hold the respondent liable would be to make it an "insurer" of the safety of its employees. On page 4 respondent contends that it was petitioner's contention below that it was the duty of the respondent to "floodlight" the railroad yard where the bunkhouse was situated for the reason which it stated on page 12 that "someone might choose to go there". We object to such unfair argument not because we are unable to answer it, but for the reason that such misstatement of our position is not only unfair but is an obstruction to the ascertainment of truth and of a fair and forthright presentation to this Court of the petition for a writ of certiorari.

See:

New York Central R. Co. v. Johnson, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706.

I.

Respondent makes no effective answer to petitioner's contention that it was respondent's duty to provide light in the railroad yard in question.

Petitioner points out in his main brief that it is the duty of a railroad company under the *Federal Employers' Liability Act* to provide artificial light where there otherwise would be danger of injury to its employees. Petitioner cited in support of that contention the following cases:

Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140;
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740;
Armenia v. Wyer, 2 Cir., 210 F. 2d 592;
Boston & M. R. R. v. Cabana, 1 Cir., 148 F. 2d 150;
Luthy v. Terminal R. Ass'n of St. Louis (Missouri 1951), 243 S. W. 2d 332.

All these cases involved the duty to light railroad yards. Petitioner also cited many cases involving the duty of persons and corporations other than railroad companies to provide artificial light where there otherwise would be danger of injury.

See:

Petitioner's Brief, pp. 18-19.

As said in *Taylor v. Texas & N. O. R. Co.*, (La. App.), 22 So. 2d 771, 773, where a railroad company provided an employee with a pushcart but with no lights on it to warn other traffic when it was dark, which thus exposed the

employee using it to danger of injury, and where the Court said (22 So. 2d 773):

> "The standard by which the negligence charged against the defendant in this case is to be measured is not by any of the provisions of that statute, but rather by its conduct in its relation with the plaintiff who alleges that he was its employee, under the particular circumstances set out by him and which he alleges gave rise to the accident and his resulting injuries. That standard by which it is to be judged in determining whether it was negligent or not, is the care and prudence which an ordinarily prudent person would exercise under similar circumstances. If they did furnish him with a push-cart with which to carry the mail it would seem that the standard required that they furnish him with one that was equipped with all that was necessary in order for him to safely operate it on a public highway. If equipping it with lights tended to promote his safety and their failure to do so was the proximate cause of the accident, as he has alleged, then he has set out a cause of action."

The verdict of the jury established as a fact that respondent's failure to light was a breach of legal duty to petitioner which exposed him to danger of injury and was the cause of the injuries which he sustained.

Dice v. Akron, Canton & Youngstown R. R. Co., 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312;

Lavender v. Kurn, supra.

See:

Petitioner's Main Brief, pp. 21-22.

Respondent cites no cases which are in point and which hold to the contrary. Respondent's main effort in its brief has been to distinguish the cases cited by petitioner in his main brief. We deferentially submit that

the distinctions attempted to be made relate to matters which are wholly immaterial and in no way controlling.

II.

Respondent's contention that to hold it liable in this case would impose upon it the duty of an insurer is absolutely without merit.

We do not deem it necessary to labor this point for the reason that on page 7 of its brief, respondent in effect admits that this Court repudiated that contention in the case of *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, where this Court in answering the contention there made by the railroad that the *Federal Employers' Liability Act* does not make the railroad company "an absolute insurer against personal injury damages suffered by its employees", said (336 U. S. 61):

> "That proposition is correct, since the Act imposes liability only for negligent injuries."

There is no more basis for defendant's contention that liability here would make it an insurer than there would be in the numerous other cases where similar liability was imposed upon other employers and other persons such as landlords and the like.

See:

Petitioner's Main Brief, pp. 15-18, and especially the cases cited in *Crawford v. Duluth, Missabe & Iron Range Railway Co.*, cited on page 15 thereof.

III.

Respondent's contention to the effect that petitioner was guilty of contributory negligence as a matter of law because he failed to provide himself with a flashlight amounts to an assertion that petitioner was guilty of contributory negligence for failure to discharge respondent's duty to light the yards.

We have already discussed this point adequately in subdivision II of our main brief at pp. 20-21 thereof. Respondent cannot evade its duty to provide light for the safety of its employees by shifting the burden of performing that duty upon the employees themselves.

Respondent cites cases which clearly are not in point. None of them involves a question of injury due to failure to light or even the question of the duty of a railroad company to light premises for the safety of its employees.

The case of *Reynolds v. Atlantic Coast Line,* 336 U. S. 207, involves the question of whether defendant's negligence in allowing canes to grow alongside the roadbed was the proximate cause of a brakeman's death caused by his climbing between the cars to get from one side of the track to the other. No question of lighting was there involved.

The case of *Great Northern Ry. Co. v. Wiles,* 240 U. S. 444, involves the question of whether a brakeman, whose duty was to put out flares when a train stopped, was guilty of contributory negligence by reason of the fact that a train which was following collided with the one on which he was working. The Court held that his failure to put out the flares was contributory negligence.

The case of *Gill v. Penn. R. R. Co.,* 201 Fed. 2d 718,

involved the question of whether the defendant was negligent by reason of the fact that it permitted an employee with a stiff leg to work in a place where he might stand up and receive a bump on the head. The Court held that the defendant was not negligent. This case also involved no question of lighting.

The case of *Wolfe v. Henwood,* 162 Fed. 2d 998, involved a case of where an employee set fire to himself by slapping his mitts against his oil soaked clothes. This was held to be contributory negligence as a matter of law. No question of duty to light was there involved.

Respondent itself admits that the case of *Atlantic Coast Line v. Craven,* 185 Fed. 2d 176, does not involve a question of lighting. That in itself shows that the case is not in point.

As we stated in the introduction, defendant has entirely misrepresented petitioner's position with respect to what lighting was required. Respondent says in its brief that petitioner would require respondent to floodlight the entire yard area. This is a positive misstatement of petitioner's position. He contended simply that some light should be provided—enough light so that he could see to walk from the bunkhouse to the place where he went to eat his meals. The stringing of a wire and bulbs would have done the job. It is doubtful that this would have cost more than $75.00 or $100.00. The lights so strung could be turned on and off as needed. The installation thereof would not be an undue hardship on respondent or any employer similarly situated. At most, that would present a question of fact for the jury and that already has been answered in the affirmative in favor of petitioner and against respondent.

IV.

Respondent's argument that petitioner was not an employee at the time of his injury presents a separate ground for the granting of certiorari in order to have this court settle the rule with respect to the matter in view of the conflict of decisions in the courts of appeals in the second and tenth circuits and to settle the conflict with respect to the rule between the state court below and that of the Court of Appeals for the Tenth Circuit.

The Court of Appeals for the Second Circuit in the case of *Mostyn v. D. L. & W. R. Co.*, 160 Fed. 2d 15, in a very well considered opinion held that, where a railroad company provides a bunkhouse for the use of its employees, the employees using the bunkhouse sustain the relation of employee to the railroad during nonworking hours when they are going to and from the bunkhouse in connection with obtaining meals, food and the like. The Supreme Court of Minnesota has so ruled in the case of *Moore v. Minneapolis & St. L. R. Co.*, 123 Minn. 191, 142 N. W. 152, 143 N. W. 326, where the Court reviewed many cases, including its prior decision in *Rosenbaum v. St. Paul & Duluth R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 A. S. R. 653. In the *Moore* case, *supra*, the Court said (123 Minn. 197):

> "This crew was furnished this caboose as a place in which to sleep, partly for their own convenience and partly for the convenience of the company. The usual leaving time of this train was 8 p.m. On the occasions when the men were obliged to take the train in sections from Des Moines to Waukee, they were on call and were subject to be called about 4 p.m. *There was clearly an invitation to the men to use this car for sleeping purposes as an incident to*

their employment. In such case they are employed while upon said car and while necessarily going to and from the same. This rule is sustained by principle and authority." (Italics supplied)

We believe that the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota in the *Moore* case, *supra,* lay down the correct rule in well considered opinions.

The Court of Appeals for the Tenth Circuit held exactly to the contrary in *Atchison, T. & S. F. R. Co. v. Wottle*, 193 Fed. 2d 628.

We deferentially submit that the decisions of the Court of Appeals for the Second Circuit in the *Mostyn* case and the Supreme Court of Minnesota in the *Moore* case, both *supra,* lay down the correct rule in well considered opinions and that the Court of Appeals for the Tenth Circuit erred in the rule laid down by it. A choice will have to be made and we think that the choice should be made in favor of the rule as announced by the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota. As a matter of fact, we think that the decisions of the Supreme Court of Minnesota show that the rule followed by that Court and by the Court of Appeals for the Second Circuit was "hornbook" law long before the *Federal Employers' Liability Act* was enacted and that the Congress must have so understood the rule when it enacted the *Federal Employers' Liability Act.*

We urge the Court for this additional reason to grant certiorari in order that the rule might be settled one way or the other.

CONCLUSION

We think that it is not sound public policy to have courts applying diverse rules in the adjudication of rights under the *Federal Employers' Liability Act*. For example, there is such diversity of rule with respect to the duty to light as between the court below and this court and the other federal courts whose decisions we have cited on the question of the duty to light. We also think that there is such diversity of rule and decision with respect to the question of whether under the circumstances existing when petitioner was injured as between the Court of Appeals for the Second Circuit and the Supreme Court of Minnesota on the other hand and the Court of Appeals for the Tenth Circuit on the other. This condition with respect to the administration of the *Federal Employers' Liability Act* seems to be a persuasive reason why this court should grant certiorari in the instant case.

Respectfully submitted,

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